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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 536

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM C. BRADEN, JR.
Commerce Building
Houston 1, Texas

HARRY S. LITTMAN
JACK WERNER
HAROLD L. TALISMAN
317 Wyatt Building
Washington 5, D. C.

Counsel for Petitioner

Washington, D. C.
November 24, 1958

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Tennessee Gas Transmission Company (Tennessee), an intervenor below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this cause on June 30, 1958.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 257 F. 2d 717 (App. A, *infra,*

pp. 1-11). The opinion of the Federal Power Commission (App. B, *infra*, pp. 13-27) is reported at 17 F.P.C. 880.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (App. A, *infra*, p. 12). By order of August 27, 1958, the Court of Appeals denied timely petitions for rehearing filed by Tennessee and other parties (App. A, *infra*, p. 12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (1948) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission lacks jurisdiction to issue a certificate of public convenience and necessity to an independent producer of natural gas, where such producer indicates an unwillingness to accept a certificate conditioned on a lower initial price than agreed to by contract.

2. Whether the Commission must, in an independent producer certificate case, determine the justness and reasonableness of the initial price when a question is raised as to the propriety of such initial price, or whether it can defer such matter for determination in a full rate investigation under section 5(a) of the Natural Gas Act.

3. Whether an objection or ground not urged before the Commission on rehearing nor before the Court of Appeals in the review proceeding, can form the basis for the decision of the Court of Appeals.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C., §§ 717-717w are set forth in Appendix C, *infra*, pp. 28-32.

STATEMENT

This petition stems from the judgment of the Court of Appeals for the Third Circuit (App. A, *infra*, p. 12) on review of an order (App. B, *infra*, pp. 13-27) of the Federal Power Commission (Commission) authorizing four independent producers of natural gas to sell gas from certain wells located in the Gulf of Mexico to Tennessee. The Court of Appeals vacated the Commission's order and remanded the proceedings to the Commission (257 F. 2d 717, 723; App. A, *infra*, p. 12).

Tennessee is a natural-gas company subject to the jurisdiction of the Commission. It operates a pipeline system extending from gas fields in Texas and Louisiana through Arkansas, Mississippi, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, and into Massachusetts, New Hampshire, Rhode Island and Connecticut. Along this route, it serves over 80 distributing companies, which in turn serve many millions of ultimate consumers.

To meet the constantly increasing demand for gas in this vast market, Tennessee is continuously searching for the best possible gas supplies at the lowest possible prices.[1]. To this end, Tennessee, in August, 1956, en-

[1] In Tennessee's recent application in Docket G-11107, it sought authority to increase substantially its system capacity in order to meet the increased requirements of its customers totalling over 300,000 Mcf per day (17 F.P.C. 461, 469).

tered into identical 20-year gas purchase contracts with four producers of natural gas, collectively referred to as CATCO[2] (R. 24a-25a, 40a-41a, 286a-328a).[3] These producers each own an undivided 25 per cent interest in leases located a substantial distance off the coast of Louisiana in the Gulf of Mexico (R. 23a-24a, 280a). From those leases, up to two trillion cubic feet of gas is dedicated to the performance of the contracts and an additional trillion cubic feet of gas can also be dedicated under the contracts (R. 236a, 294a-296a).

The Commission Proceedings

The CATCO producers filed applications with the Commission for certificates of public convenience and necessity authorizing the sales to Tennessee pursuant to the aforementioned contracts. The Commission consolidated the applications for hearing. By order issued February 27, 1957, Tennessee was permitted to intervene in the consolidated proceeding (R. 330a). By the same order, four customers of Tennessee were permitted to intervene, two of which are respondents herein (R. 330a). The Public Service Commission of the State of New York (New York Commission), the other respondent herein, intervened in the Commis-

[2] Cities Service Production Company, Atlantic Refining Company, Tidewater Oil Company and Continental Oil Company. None of these companies own any interest in Tennessee or in each other. Tennessee does not own any interest in any of these companies (R. 24a).

The record references set forth herein are to the certified copy of the record filed by the above named companies with their Petition For A Writ Of Certiorari in case number 518. The abbreviation "R." refers to the page of the joint appendix.

[3] Since the contracts with the four producers are identical, only one of the contracts was designated for printing in the joint appendix.

sion proceeding by the filing of a Notice of Intervention (R. 329a).

The major concern of these intervenors before the Commission was the initial price of 21.4 cents[4] per Mcf which Tennessee had agreed to pay for this gas. This price was the result of arm's-length negotiations extending over a period of some ten months (R. 24a, 43a). Tennessee acknowledged that this was a higher price than it was paying under any of its other previously-executed contracts.[5]

However, the immensity of the reserves dedicated to the contracts makes it unique when compared with Tennessee's other gas purchase contracts. Indeed, as far as is known, it is the largest block of gas ever sold in one transaction on the Gulf Coast (R. 41a-42a, 251a). The CATCO reserve constitutes from 11 to 12 per cent of the total reserves available to Tennessee (R. 139a-140a) and is located in a new gas producing area where neither Tennessee nor any other pipeline company has gas purchase contracts (R. 43a-44a).

This vast reserve is well located in relation to Tennessee's system, thereby affording Tennessee an entry

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[4] Plus 1 cent for the Louisiana gathering tax. The intervenors were also concerned with escalation provisions in the contracts which required at every four-year interval after November 1, 1962, an automatic increase in price of 2 cents per Mcf (R. 310a). This concern was alleviated by the producers, however, by their later agreement to modify these provisions so that the Commission would retain jurisdiction over the increases in the event the Harris Bill (H.R. 6790, 85th Congress), or substantially similar legislation was enacted into law (App. B, *infra*, pp. 17-18).

[5] Assuming the purchase of 240,000 Mcf of gas per day under the instant contracts during the entire year 1958, Tennessee's weighted average cost of gas would be increased by only 0.97 cents per Mcf (R. 45a).

into the vast areas of gas reserves situated off-shore from the State of Louisiana (R. 41a, 250a-251a). To attach the reserves Tennessee had to construct only 46.4 miles of pipeline (R. 45a-46a). This is to be contrasted with over 500 miles of pipeline which Tennessee had to build in order to bring certain Texas gas into its system. Further indication of the value of these reserves in relation to location is shown by the fact that El Paso Natural Gas Company, which was also negotiating for these same reserves, would have had to build 600 miles of pipeline to bring the gas involved into its system (R. 250a-251a). Among other pipe line companies attempting to purchase these reserves were Southern Natural Gas Company, United Fuel Gas Company and American Louisiana Pipe Line Company (R. 42a).

While the Respondents herein attacked the initial price of 21.4 cents per Mcf as being too high, no evidence in support of their contention was offered. They nevertheless urged that the certificates be conditioned on a lower price, although, as shown below, they did not agree on what that price should be (R. 378a-379a, 389a-390a).

On March 29, 1957, the Presiding Examiner issued his Decision (R. 335a-359a) wherein he recommended a grant of the producer certificates applied for, but declined to impose a condition requiring a reduction in the initial price of 21.4 cents. In exceptions filed to that decision, the New York Commission requested the imposition of a condition requiring an initial price of 15.4 cents per Mcf, exclusve of tax (R. 389a); Lake Shore Pipe Line Company (not a party herein) requested a 17-cent initial price; Public Service Electric and Gas Company (Public Service) requested the

imposition of a price condition "which would require that the proposed sales be made at such lower price which would protect the interest of the consumers" (R. 394a); and Long Island Lighting Company (Long Island) requested that if the 21.4-cent initial rate were permitted to stand, the rate be made the subject of rate investigations under Section 5(a) of the Natural Gas Act[6] (R. 379a).

On April 22, 1957, the Commission, upon review of the Examiner's Decision, issued an order (17 F.P.C. 574) granting temporary certificates to the producer-applicants,[7] but remanded the matter to the Presiding Examiner "to determine at what rates the public convenience and necessity requires these sales to be made if permanent certificates are to be granted to these companies upon final disposition of their applications" (17 F.P.C. 574, 576).[8]

A motion for modification of the April 22, 1957 order was filed by the producer-applicants on May 6, 1957 (R. 396a-404a), in which they pointed out that the economic risk to which they would be exposed precluded their acceptance of the temporary certificates. Accordingly, they requested the issuance of permanent certificates without condition as to initial price. They did offer, however, to amend the price escalation pro-

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[6] This is precisely what was done by the Commission in its Order (App. B, *infra*, pp. 13-27).

[7] By the same order, a temporary certificate was issued to Tennessee authorizing the construction of the facilities necessary to bring the gas into its system. Such facilities have been constructed.

[8] The Commission there concluded that there was insufficient evidence on which to base a finding that the public convenience and necessity required the sales at the particular price proposed (17 F.P.C. 574, 575).

visions of the contracts so as to assure Commission jurisdiction over such prices in the event the Harris Bill (H.R. 6790, 85th Congress) was enacted into law (R. 401a-403a).

On May 20, 1957, the Commission issued an order in which it granted permanent certificates to the producer-applicants as requested in their motion for modification. By the same order, however, it conditioned the certificates by requiring an amendment of the gas purchase contracts so as to provide for an initial price of 17 cents per Mcf (exclusive of the one-cent gathering tax) with the right of the producers to file for an increase in rates (not to exceed 21.4 cents per Mcf) to be effective one day after commencement of deliveries to Tennessee (17 F.P.C. 732). The price of 17 cents was selected by the Commission simply because it was the highest price then being paid by Tennessee for gas purchased in the southwestern part of the United States (17 F.P.C. 732, 734).

On June 4, 1957, Tennessee filed an Application for Rehearing of the May 20, 1957 order (R. 416a-423a). In its Application for Rehearing, Tennessee stated (R. 418a):

> "Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf. Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated. It is clear, therefore, that Tennessee now faces the stark reality of contract termination; and its customers face the grim reality of suffering the loss of natural-gas supplies

> which are required to insure adequate and continuous long-term service and to meet the expanding needs of the consumers. The consequences of the loss of these valuable gas reserves are so far-reaching and the impact thereof on the economy of the areas involved is so great, at to stagger the imagination. * * *"

Oral argument was held before the entire Commission, and on June 24, 1957 the order here involved was issued by the Commission (App. B, *infra*, pp. 13-27).[9] Upon further evaluation of the record, the Commission found that "the record does not show that the 21.4 cent price is excessive." It concluded that in the light of the circumstances involved, and in view of the fact that it could protect the public "with respect to the matter of price" through the rate investigation provisions of the Act, the "precise charge that is made initially is less important than the assurance of this great gas supply." The Commission, therefore, reversed its previous determination and issued certificates without any condition affecting the initial price. While the order permitted the initial rate to remain at 21.4 cents, it made the rate subject to investigation as to the justness and reasonableness

[9] At the oral argument it was demonstrated that in a number of cases the Commission had authorized sales along the Louisiana Gulf Coast at an initial price of 20 cents or more. (See also R. 248a-249a). For example, see *Houston, Texas Gas & Oil et al*, 16 F.P.C. 118, 125, where initial price was "21.0 cents per Mcf for the first two years after initial delivery and 22.5 cents per Mcf after the first two years." Affirmed on appeal, where intervenors raised similar price issue to that in the instant case, *sub nom., Florida Economic Advisory Council* v. *F.P.C.*, 251 F. 2d 643, 646 (D.C. Cir. 1957); *cert. den.*, 78 S. Ct. 996.

thereof in Section 5(a) proceedings instituted against all four of the producer-applicants.[10]

In the same order, the Commission required the contracts to be amended "so that the price increases will remain subject to our control by using 'indefinite pricing clauses' rather than 'definite pricing clauses' within the meaning of the Harris Bill [H.R. 6790, 85th Congress]."

The respondents filed petitions for review which were predicated, in essence, on the contention that the Commission abused its discretion in not conditioning the certificate on a lower price. The Court of Appeals, in vacating the Commission's order, stated, *inter alia:*

> "* * *. We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity." (App. A, *infra*, p. 7).
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> "It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates without rate conditions by its order of June 24, 1957. * * *" (App. A, *infra*, p. 8).
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> * * * * *

[10] Section 5(a) rate investigations had already been instituted against three of the producers. Accordingly, concurrently with the issuance of the June 24, 1957 order, the Commission instituted a Section 5(a) investigation against the fourth producer, Cities Service Production Company (App. B, *infra*, pp. 13-27). Those investigations are now in progress.

"The Commission has jurisdiction to issue certificates under Section 7(e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a limited *inquiry*.

"Congress has also made it clear that the applicant must be *willing* to perform the services proposed and conform to the provision of the Act. The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications. The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions of the Act. Such regulations may not be the result of bargaining with an unwilling seller." (App. A, *infra*, p. 11).

REASONS FOR GRANTING THE WRIT

In holding, in effect, that an applicant who indicates an unwillingness to accept a certificate containing a particular type of price condition, thereby ousts the Commission from jurisdiction to consider favorably the application involved, the court below has grossly misconstrued and misapplied the Natural Gas Act. We believe that the decision of the court below, if permitted to stand, will seriously impair the ability of the Federal Power Commission properly to dis-

charge its statutory duties and functions, and will ultimately redound to the deteriment of the gas consuming public.

The basic issue before the court below was whether the Commission abused its discretion in declining to condition the certificate on a lower initial price. The court below, instead of considering that issue, reversed the Commission on the jurisdictional ground set forth above, which ground was neither urged before the Commission in an application for rehearing, nor before the court in briefs or oral argument.

But the greater mischief and error of the decision of the court below lies in its holding that the Commission lacked statutory jurisdiction to issue the certificates involved because of the unwillingness of the producer-applicants to accept a lower initial price for their gas than had been agreed to by contract.

1. Importance

As the court is aware, the natural gas industry has been, and continues to be, a rapidly expanding industry. The demands for natural gas for space-heating and for industrial purposes continues to grow at a rapid rate. To satisfy that demand, pipeline companies are constantly seeking certificate authority from the Commission to build new pipelines or expand their present systems. Invariably, however, a requested certificate will not be issued by the Commission unless the applicant pipeline company is able to show adequate gas reserves under its control, by ownership or contract, to support its project. We know of no large interstate pipeline company which owns all the gas reserves necessary to meet the requirements of its customers. Those requirements are met, for the most

part, by gas purchased from various independent producers, such as the CATCO companies, pursuant to arm's-length negotiated contracts. However, before the sale by the independent producer can be made to the pipeline company, a certificate of public convenience and necessity must be secured by the producer from the Commission. It is that type of producer certificate proceeding which is involved in this case.

Because the producer applicants stated their unwillingness to commit their gas to the interstate market at a lower *initial* price than that agreed upon by contract, the court below was of the view that the Commission lacked jurisdiction to issue certificates to them. Such stated unwillingness on the part of the producers, in the view of the court below, circumscribed the scope of the Commission's inquiry "by attaching a condition to its application requiring the Commission to forego the consideration of an element [the initial price] which may be necessary in the formulation of its judgment." The Commission, stated the court below, "has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry" (App. A, *infra*, p. 11).

It is apparent, however, from the Commission's order (App. B, *infra*, pp. 13-27), that the Commission did consider the element of price. It weighed the matter of price alongside the undisputed need for gas in the interstate market. It balanced the interests of all concerned and arrived at its informed judgment that the public convenience and necessity would be better served by removing the price condition which it had previously felt should be included in the certificates. To be sure, the Commission made no findings as to the justness and reasonableness of the initial

price. But a certificate proceeding is not the type of proceeding wherein it is feasible to inquire into the justness and reasonableness of price. So long as the Commission has full control over price, as it has here by virtue of the Section 5(a) investigations which it instituted, due and timely execution of its functions require that certificate proceedings not be delayed pending full inquiry into rate matters.

By this practice, the Commission eliminates the risk of losing or delaying the acquisition of valuable gas reserves for the interstate market. If, at the conclusion of the Section 5(a) investigation, the Commission finds the price to be unreasonably high, reductions therein can be ordered. It is true that there is a risk that the consumer, during the interim, may pay a higher price than is ultimately found reasonable. But it is for the Commission to decide whether such risk outweighs the practical necessity of securing, at the earliest opportunity, the gas for the interstate market. The court below, we submit, should not have substituted its judgment for that of the Commission. *Charleston & Western Carolina Ry. Co.* v. *Federal Power Commission*, 234 F. 2d 62, 64 (D.C. Cir., 1956).

The fact that the applicants stated an unwillingness to commit their gas to the interstate market at a lower *initial* price than that agreed upon by contract, did not, and could not, circumscribe the scope of the Commission's inquiry. An applicant for a certificate has no obligation to accept a certificate from the Commission containing conditions which the applicant considers unreasonable or otherwise unacceptable. He does not subject himself to the jurisdiction of the Commission by the mere act of filing an application for a certificate. He only

subjects himself to the jurisdiction of the Commission if he accepts the certificate and puts his gas in the interstate market. Cf., *Central West Utility Company* v. *Federal Power Commission*, 247 F. 2d 306 (3rd Cir. 1956).

Every applicant for a certificate is, in essence, requesting a certificate exactly as set forth in his application. Implicit in every application is the understanding that unless the certificate issued is acceptable to the applicant, he will refuse it. It cannot be assumed, however, as the court below apparently did, that implicit in the filing of an application is a legal requirement that the applicant be willing to accept any certificate issued by the Commission, regardless of the conditions imposed therein. Indeed, the Commission's rules specifically provide that any certificate issued by it "shall be void and without force or effect unless accepted in writing by applicant within 30 days from the issue date of the order issuing such certificate" (18 C.F.R. 157.20).

2. Commission Discretion

In the instant case, the Commission was confronted with a very practical problem, namely, the need for additional gas for the interstate market—particularly an amount as large as that involved herein (App. B, *infra*, p. 16). It was, of course, disturbed by the fact that the 21.4-cent price was higher than the price being paid by Tennessee under other gas purchase contracts. Faced with the fact that gas would be lost to the interstate market, the Commission, in its informed discretion, decided to permit the CATCO companies to charge the 21.4-cent price until such time as it could determine,

in a full-fledged rate investigation, whether or not that price was too high.[11] As noted above, the 21.4-cent rate was made the subject of Section 5(a) investigations, and such investigations are now in progress.

In many pipeline, as well as producer, certificate cases, time is either of the essence or is extremely important to the applicant or the distributor who is to receive the gas from the pipeline company. For example, gas leases contain provisions for the payment of "shut in" royalties unless the gas is produced and marketed as rapidly as is reasonably possible in accordance with state conservation laws. The need for capital to further develop a lease presents, in many cases, an impelling need to obtain an immediate sale of gas from wells already completed. Many leases contain provisions permitting the lessor to cancel the lease unless the gas is marketed within a specified time. See *In the Matter of Seaboard Oil Co., et al.*, 19 F.P.C. 416, 421 (1958). Indeed, in the instant case, the leases held by the CATCO producers would have been in jeopardy unless production was commenced in 1958 (R. 26a-27a, 78a).

In the light of such facts and in view of the thousands of independent producer certificate applications being handled by the Commission (see F.P.C. Release No. 9920, issued July 8, 1958), to inquire into the justness and reasonableness of initial rates in every producer certificate case where the price

[11] It should be noted that there is not the slightest indication in the record that the 21.4-cent price is unjust or unreasonable. In this regard, the record only shows that it is a higher price than Tennessee is paying under its other gas purchase contracts.

issue is raised, would inevitably result in the bogging down of the Commission's producer licensing functions into a morass of certificate cases turned into *de facto* rate cases. And, in the meantime, the building of new pipelines and the extension and expansion of existing pipelines will most assuredly be delayed or as a practical matter denied, by the delays attendant upon awaiting the outcome of those producer certificate cases.

Tennessee has no desire to pay more than a just and reasonable price for the gas purchased by it. It must be recognized, however, that as of the present, the Commission has been unable to arrive at a satisfactory standard or method by which to determine the proper field prices for gas. The needed expansion of the pipeline industry cannot mark time while the Commission is struggling for a proper formula or standard by which to measure justness and reasonableness of producer prices. So long as the Commission has rate investigatory powers under Section 5(a) of the Act, it is legally justified in facilitating certificate cases, and leaving to Section 5(a) investigations any issues raised as regards price. *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F. 2d 643, 646 (D.C. Cir., 1957), cert. den., 78 S. Ct. 996.

On facts closely paralleling the facts in this case, the Court of Appeals for the District of Columbia Circuit reached an opposite result in *Oklahoma Natural Gas Company* v. *Federal Power Commission*, 257 F. 2d 634 (1958), certiorari granted November 10, 1958. In both cases certain intervenors sought to have the producer certificates conditioned on a lower price. In both cases the producers advised the Commission in advance that

they would not accept certificates conditioned on a lower price.[12] In both cases the Commission considered the same type of evidence on price, and issued certificates without conditioning them on lower initial prices.

The essential difference between the two cases is in the results reached. In the instant case, the court *sua sponte* held that the Commission was without jurisdiction to issue a certificate once the producers advised the Commission that they were unwilling to accept a price condition. Although the same facts existed in the *Oklahoma Natural* case, the court there held that the Commission did not err or abuse its discretion in refusing to attach a price condition to the certificate.

While the approach of the two courts was different, the fact remains that on essentially identical facts, the Court of Appeals in the *Oklahoma Natural* case reached an opposite—but appropriate result. See also *Florida Economic Advisory Council* v. *Federal Power Commission, supra.*

3. Jurisdiction

The basic issue before the court below was whether the Commission abused its discretion by declining to condition the certificate on a lower initial price. This issue the court did not decide.[13] Instead, the court

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[12] See record pages 477-478 in Case No. 288, in the Supreme Court of the United States, October Term, 1958, *Oklahoma Natural Gas Company* v. *Federal Power Commission.*

[13] We have serious doubts that there can be reversible error for refusing to exercise a discretionary conditioning power. Cf. *Wilbur* v. *United States*, 281 U.S. 206, 218-9 (1930); *Thomas* v. *Vinson*, 153 F. 2d 636, 638 (C.A.D.C., 1946).

sua sponte, decided the case on the jurisdictional basis mentioned above.

Section 19(a) of the Natural Gas Act provides that as a condition precedent to invoking the review authority of the courts, a petitioner must first file with the Commission an application for rehearing setting forth the specific ground or grounds upon which such application is based. Section 19(b) of the Act further provides that:

> "* * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *"

The decision of the court below rests on its determination that the Commission lacked authority to issue a certificate once the applicants advised the Commission in advance that they were unwilling to accept a certificate conditioned on a lower initial price. Even assuming, *arguendo*, that this determination is correct (and we submit it is not) the court below was precluded from deciding this case on such ground because it was not first raised before the Commission. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649-651 (1945); 65 S. Ct. 821, 828-829. Courts are also precluded from raising the matter *sua sponte*. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-501 (1955); 75 S. Ct. 467, 471-3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WILLIAM C. BRADEN, JR.
Commerce Building
Houston 1, Texas

HARRY S. LITTMAN
JACK WERNER
HAROLD L. TALISMAN
317 Wyatt Building
Washington 5, D. C.

Counsel for Petitioner

Washington, D. C.
November 24, 1958